

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: KRB Seed Company, LLC

Serial No.: 76/535,843

Filed: July 30, 2003

For: **REBEL (Design, Class 31)**

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APPLICANT'S APPEAL BRIEF

Dear Sir:

The final refusal of July 28, 2004 (renewed August 3, 2004) refused registration on the ground that Appellant had not entered a disclaimer of exclusive rights to the mark REBEL apart from the mark as shown and that the mark as a whole was descriptive. The Office Action asserted that as a varietal name for grass seed, REBEL is generic. This refusal is in error and should be reversed.

FACTS

This application was filed on July 30, 2003, seeking registration of the mark REBEL in a stylized form for grass seed. Applicant and its predecessors in interest began use of REBEL in the form sought to be registered on August 1, 1998 for grass seed and as a word mark over 24 years ago on August 21, 1980, exceeding the five-year period required under Section 2(f) for a presumption of secondary meaning.

As grounds for saying the stylized mark is merely descriptive and requiring disclaimer, the Examining Attorney said that the mark was the varietal name for the identified goods (grass seed), citing Trademark Act sections 1, 2, 6, and 45, 15 USC sections 1051.



1052, 1056 and 1127. The Examining Attorney said a plant patent identified the protected variety. He went on to say that varietal or cultivar names are generic designations and cannot be registered as trademarks. Appellant responded, pointing out that the harsh rule leading to early cases such as *In re Farmer Seed and Nursery Co.*, 137 USPQ 231 (TTAB 1963) had been recently modified by the United States Supreme Court in *TrafFix Devices Inc. v. Marketing Displays Inc.*, 532 US 23, 58 USPQ 2d 1001 (2001), so REBEL is not generic and need not be disclaimed. The Examining Attorney issued a final Office Action maintaining the refusal, alleging that REBEL is generic and in a stylized form is merely descriptive and continuing the disclaimer requirement. In the Office Action the Examining Attorney said “**It is against public policy** for any one supplier to retain exclusivity in a patented variety of plant, or the name of a variety, once its patent expires.” (Office Action of July 28, 2004, page 2, emphasis original) This appeal followed.

Applicant concedes that REBEL has been used as varietal name, but disputes that such usage requires a conclusion that the mark is generic and subject to disclaimer. The facts show trademark usage, not usage as a generic word. Attached to the final Office Action was part of a print out indicating that Rebel grass seed is also known as “*festuca arundinacea schreber*” and that a synonym is “Bartes.”

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ARGUMENTS

I. The No-Varietal-Names-As-Trademarks Rule is Wrong, Dated, and Inconsistent With Modern Intellectual Property Law.

The Examining Attorney required disclaimer on the ground that applicant's mark is a varietal name for grass seed, citing TMEP Section 1202.12 (Varietal and Cultivar Names (Examination of Applications for Seeds and Plants)) and *Dixie Rose Nursery v. Coe*, 131 F.2d 446, 55 USPQ 315 (D.C. Cir. 1942), *cert. denied* 318 U.S. 782, 57 USPQ 568 (1943). The *Dixie Rose* court was concerned about extension of the monopoly afforded by the applicant's patent. This extension of monopoly concern is at the root of the "no-varietal-names-as-trademarks" rule. The court in *In re Farmer Seed & Nursery Co.*, 137 USPQ 231 (TTAB 1963) set forth its rationale for this "no-varietal names as trademarks" rule thusly:

Manifestly, any rights which applicant enjoys in the "CHIEF BEMIDJI" plant derives from its patent since others are prohibited from growing and selling this variety during the life of said patent. To grant applicant a registration of this designation with all the statutory presumptions accruing therefrom would be inconsistent with the right which others will have upon the expiration of the patent not only to grow and sell the plant but also to use the "CHIEF BEMIDJI" as a varietal name thereof...*Kellogg Company v. The National Biscuit Company*, 305 US 111, 39 USPQ 296 (1938) (137 USPQ at 232)

Thus, the premise that one who has a plant patent or plant variety protection certificate should not be entitled to claim trademark rights in the varietal name of the plant derives from the *Kellogg Company* case, which enunciated the policy of the rule this way:

"Since during the life of the patents "Shredded Wheat" was the general designation of the patented product, there passed upon to the public upon the expiration of the patent, not only the right to make the article as it was made during the patent period, but also the right to apply thereto the name by which it has become known." (39 USPQ at 299)

Today, the Trademark Office in general, and the Examining Attorney specifically, uses this rationale to consider plant varietal names generic, and thus unregistrable. The Final Refusal,

in fact, said: “**It is against public policy** for any one supplier to retain exclusivity in a patented variety of plant or the name of the variety, once the patent expires.” Final Refusal, page 2.

Nothing more is needed to support the genericness refusal according the rules as applied by the Examining Attorney. This avoids thinking about the basis of the rule: the concern about preventing the extension of monopoly. It also avoids consideration of the standard for genericness: What is the primary significance of the mark to the purchasing public? The stringent rule set forth in the *Farmer Seed* and *Kellogg Company* cases have been disavowed as to most forms of intellectual property. It is time to abolish the rule that says varietal names are generic.

A. The No-Varietal-Names-As-Trademarks Rule is Inconsistent With Modern Intellectual Property Law.

Kellogg's per se rule prohibiting trademark protection simply because an applicant procured another form of intellectual property protection no longer applies to design patents, utility patents, or copyrights. *TrafFix Devices, Inc. v Marketing Displays, Inc.*, 532 U.S. 23, 36, 58 U.S.P.Q.2d 1001 (2001); *In re Deister Concentrator Co.*, 289 F.2d 496, 501, 48 CCPA 952, 962 (1961); *In re Mogen David Wine Corp.*, 328 F.2d 925, 51 CCPA 1260 (1964); *In re Honeywell*, 181 U.S.P.Q. 821, 497 F.2d 1344 (C.C.P.A. 1974); *Boston Professional Hockey Association, Inc. v. Dallas Cap & Emblem Manufacturing, Inc.*, 185 U.S.P.Q. 364, 510 F.2d 1004, 1014 (5th Cir.), cert. denied, 423 U.S. 868, 96 S.Ct. 132, 46 L.Ed.2d 98 (1975); *Frederick Warne & Co., Inc. v. Book Sales, Inc.*, 481 F. Supp. 1191, 205 USPQ 444 (S.D.

N.Y. 1979). And Congress has also moved away from such analysis (See Section C, *infra.*). Plant variety protection should not be treated differently.

**i. The No-Design-Patent-Subject-Matter-As-Trademarks Rule was
Abolished Long Ago.**

Over forty years ago, the CCPA, predecessor to the Court of Appeals for the Federal Circuit, threw out a no-design-patent-subject-matter-as-trademarks rule in *In re Deister Concentrator Co.*, 289 F.2d 496, 501, 48 CCPA 952, 962 (1961); *In re Mogen David Wine Corp.*, 328 F.2d 925, 51 CCPA 1260 (1964), and *In re Honeywell*, 181 U.S.P.Q. 821, 497 F.2d 1344 (C.C.P.A. 1974). As the CCPA said in *Honeywell*:

In our opinion, trademark rights, or rights under the law of unfair competition, which happen to continue beyond the expiration of a design patent, do not 'extend' the patent monopoly. They exist independently of it, under different law and for different reasons. The termination of either has no legal effect on the continuance of the other. When the patent monopoly ends, it ends. The trademark rights to not extend it.

Thus, as regards design patents, the concern about extension of monopoly that underlies the reasoning of *Farmer Seed* was stripped of force. The next paragraph of *Honeywell* can be paraphrased quite smoothly to address the situation of Plant Variety Protection:

That holding recognized the clear distinction between the underlying bases of the federal trademark and plant variety protection [design patent] laws. Federal plant variety protection [design patent] laws were created to encourage the invention of [ornamental designs] new varieties of plants. Federal trademark laws, which are independent in origin from the plant variety protection [design patent] laws, seek to prevent the public from encountering confusion, mistake, and deception in the purchase of goods and services and to protect the integrity of the trademark owner's product identity. With that distinction in mind, this court decided that the public interest-- protection from confusion, mistake, and deception in the purchase

of goods and services-- must prevail over any alleged extension of plant variety protection [design patent] rights, when a trademark is non- functional and does in fact serve as a means to distinguish the goods of the trademark owner from those of others. (497 F.2d at 1348 – added words underlined to replace original, deleted material, that is bracketed)

Thus, design patents will not automatically preclude a trademark. Nor should plant variety protection.

ii. Even Utility Patents Do Not Automatically Preclude Trademarks.

TrafFix Devices, Inc. v Marketing Displays, Inc., 532 U.S. 23, 58 U.S.P.Q.2d 1001 (2001) raised the issue of the protection of trade dress (a form of unfair competition law that *Honeywell* says protects interests similar to trademarks) in a feature that had been protected by a utility patent. The Court found a rebuttable presumption of functionality of such patented features. Since it is rebuttable, the trade dress claimant has the possibility of rebutting the presumption to establish trademark-like trade dress protection. Addressing an argument for a rule denying the possibility of rebuttal the Supreme Court said:

TrafFix and some of its *amici* argue that the Patent Clause of the Constitution, Art. I, § 8, cl. 8, of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection. ... We need not resolve this question. If, despite the rule that functional features may not be the subject of trade dress protection, a case arises in which trade dress becomes the practical equivalent of an expired utility patent, that will be time enough to consider the matter. 532 U.S. 36.

The Supreme Court refused to adopt the amici's proposed rule, which would have been as stringent as the *Dixie Rose* case rule as applied by the Examining Attorney. The Supreme Court did not adopt a rule that, without more, prevented trademark or trade dress protection in a case involving expired utility patent protection.

iii. Nor Will A Copyright Strip An Author of Trademark Protection.

Copyright owners have not been denied trademark protection for indicia of source that are also works protected by copyrights. In *Boston Professional Hockey Association, Inc. v. Dallas Cap & Emblem Manufacturing, Inc.*, 185 U.S.P.Q. 364, 510 F.2d 1004, 1014 (5th Cir.), cert. denied, 423 U.S. 868, 96 S.Ct. 132, 46 L.Ed.2d 98 (1975) the court stated:

A trademark is a property right which is acquired by use. Trade-Mark Cases, 100 U.S. 82, 25 L.Ed. 550 (1879). It differs substantially from a copyright, in both its legal genesis and its scope of federal protection. The legal cornerstone for the protection of copyrights is Article I, section 8, clause 8 of the Constitution. In the case of a copyright, an individual creates a unique design and, because the Constitutional fathers saw fit to encourage creativity, he can secure a copyright for his creation for a (limited period of time). After the expiration of the copyright, his creation becomes part of the public domain. In the case of a trademark, however, the process is reversed. An individual selects a word or design that might otherwise be in the public domain to represent his business or product. If that word or design comes to symbolize his product or business in the public mind, the individual acquires a property right in the mark. The acquisition of such a right through use represents the passage of a word or design out of the public domain into the protective ambits of trademark law. Under the provisions of the Lanham Act, the owner of a mark acquires a protectable property interest in his mark through registration and use.

Accord, *Frederick Warne & Co., Inc. v. Book Sales, Inc.*, 481 F. Supp. 1191, 205 USPQ 444 (S.D. N.Y. 1979) (The fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws so long as it is shown to have acquired independent trademark significance, identifying in some way the source or sponsorship of the goods.) See also, *Tristar Pictures, Inc. v. Del Taco, Inc.*, 1999 WL

33260839, *2, 59 U.S.P.Q.2d 1091 (C.D.Cal. 1999) and *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 578 F.Supp. 911, 919, 221 U.S.P.Q. 991 (S.D.N.Y. 1983).

Design patents, utility patents, and copyrights no longer do to trademarks what the Examining Attorney allowed plant variety protection to do to applicant's mark.

B. "Extension of Monopoly" is even less of a risk for Applicant's mark than *Honeywell*, *TrafFix*, or *Boston Professional Hockey*.

Providing exclusive trademark rights to Applicant's mark will be even less likely to extend monopoly rights than for the cases cited above in Section A. In those cases the thing that was given statutory exclusivity (e.g. the thermostat cover in *Honeywell*; the sign base in *TrafFix*; the patch in *Boston Professional Hockey*) was exactly the thing to be protected as a trademark or trade dress. In Applicant's case, the thing given Plant Variety Protection was the seed, not the name of the seed. The risk of "monopoly" extension, therefore, is even more attenuated in this case.

C. Congress has Removed the Underpinnings of the No-Varietal-Names-as-Trademarks Rule

Since the *Dixie Rose* case was decided in 1943, Congress has amended the Trademark Act at least twice to demonstrate that the harsh application of the rule of *Kellogg* (that was, in effect, applied to applicant's mark by the Examining Attorney) was not correct. In 1962, section 14(c) of the Lanham Act was amended to remove an inference that the expiration of a patent made its associated mark generic. It did so by deletion of the italicized words of the following sentence permitting cancellation of registrations: "if the registered mark becomes

the common descriptive name of an article or substance *on which the patent has expired.*”

The existence, or not, of a patent is simply irrelevant. The amendment refined the definition of “generic” (or “common descriptive name”) in the context of a cancellation proceeding, but the standard for genericness is no different at the application stage.

In 1984, in response to *Anti-Monopoly v. General Mills Fun Group, Inc.*, 684 F.2d 1310 (9th Cir. 1982), Congress made clear that uniqueness of the goods with which the mark is used (i.e. such as may be imparted by a patent or a PVP certificate) does not make the mark generic, again in the context of a cancellation of a registered mark. Congress added to Section 14 of the Lanham Act that a mark could not be deemed generic solely because the mark has also been “used as a name of or to identify a unique product or service.” A similar amendment was made to the general definition of “trademark” in Section 45 of the statute.

Mere uniqueness of the goods (i.e. applicant’s grass seed) does not make the mark generic.

The significance of this statutory change was relied upon by the Court of Appeals for the Federal Circuit in *In re Montrachet*, 878 F.2d 375, 11 USPQ 2d 1393 (Fed. Cir. 1989). There, the marketer of MONTRACHET cheese having unique characteristics sought registration of its mark. The Court reversed erroneous refusals to register the mark made by the examining attorney and Trademark Trial and Appeal Board, saying:

The uses on which the Commissioner relies are not inconsistent with the trademark status of MONTRACHET. They do not establish that the mark is viewed by the public as a generic name. That a particular source makes a goat cheese with recognizable characteristics does not convert the designation of source to a common or generic name. To the contrary, it is the trademark function to so identify a product that the consumer is assured of the quality and characteristics that it has come to associate with a particular source of that product.

Congress has reinforced, by statutory enactment, that it is not destructive of the trademark function to identify a product by the name coined by its purveyor. “A

registered mark shall not be deemed to be the common descriptive name of goods or services solely because such mark is also used as a name of or to identify a unique product or service." 15 U.S.C. § 1064(c) (Supp. II 1984). 878 F.2d at 377-378,

Similarly, that a particular source makes a grass seed with recognizable characteristics does not convert the designation of source to a common descriptive or generic name. To the contrary, it is the trademark function to so identify a product that the consumer is assured of the quality and characteristics that it has come to associate with a particular source of that product.

"In sum, the 1984 amendment makes the test for genericness the primary significance of the mark to the relevant public limited to actual or potential purchasers of the goods or services." *Magic Wand, Inc. v. RDB, Inc.* 940 F.2d 638, 641, 19 U.S.P.Q.2d 1551 (Fed. Cir. 1991). This test does not mention patents or plant variety protection, the focus of the rule applied by the Examining Attorney. There is no evidence in this case to indicate that the relevant public regards REBEL as other than a trademark.

D. Bringing Trademark Law for Plant Varieties Up To Date.

Courts have recognized that trademarks are source indicators rather than exclusivity extenders. Thus, other forms of statutory intellectual property protection do not automatically deny trademark rights for their associated marks. It is time that the same rule be applied to plant variety protection. No rational basis can be articulated for singling out the statutory protection of plant varieties for continued application of a rule long since discarded for other forms of protection. The scholars agree that continued application of the *Kellogg* rule is inappropriate.

Professor McCarthy in his treatise, *McCarthy on Trademarks and Unfair Competition* (4th Ed.) at sections 12:52-12:54 points out that the *Kellogg Company* rule is not stringently applied and is incorrect. As Professor McCarthy clarifies, simply because a product is protected with a patent (and the same would hold true for a PVP) does not, without more, mean that that word used commercially to denominate that product has become generic. See also, Gilson, *Trademark Protection and Practice*, section 2.02 [3].

A finding of genericness of the mark is not appropriate as a knee jerk response to the fact that Applicant's grass seeds have had plant variety protection. But, that is the basis for the Examining Attorney's refusal. That refusal is unsupported. REBEL has not been shown to be a generic name for grass seed, thus applicant should not be refused registration for failing to disclaim it.

II. REBEL Is Not Generic.

A. The Requirement of Disclaimer Is Wrong Because It Is Based On An Incorrect Application of *Dixie Rose*.

The Examining Attorney, by ruling that plant varietal names are generic, has not correctly applied *Dixie Rose*. The relevant portion of *Dixie Rose* reads:

If a man should invent a combination automobile and airplane, and call it an ambi, the name would at first be arbitrary and not descriptive. But if the name were applied, for a considerable period, to all such combinations and to nothing else, the name would come to identify and describe the thing, as the word "cellophane" has come to describe a thing. The meaning which should be given to the words constituting the mark is the impression and signification which they would convey to the public. The Patent Office and District Court might properly conclude that the words "Texas Centennial," though originally arbitrary, have come to describe to the public a rose of a particular sort, not a rose from a particular nursery. It follows that the statute forbids the registration...

Dixie Rose Nursery v. Coe, 131 F.2d 446, 447 55 USPQ 315, 316 (D.C. Cir. 1942), *cert. denied* 318 U.S. 782, 57 USPQ 568 (1943), (internal citations omitted)(emphasis added).

The *Dixie Rose* case actually requires several conditions to be satisfied to find that an initially arbitrary name has become a generic term:

(1) The term must be “applied, for a considerable period, to all such combinations and to nothing else.” The term “rebel” has not been “applied, for a considerable period, to all such combinations and to nothing else.” *Id.* The word “rebel” is a term of common usage, and is applied often in reference to matters not related to grass seed. In fact, rebel is commonly defined as “to resist authority” or one who does such. Also, the Examining Attorney’s citations show use of the word “rebel” to refer to such plants as wheat, French beans and radishes. These are not Applicant’s goods. The word “rebel” has not been applied only in reference to a variety of grass seed, as required by *Dixie Rose*.

(2) The term’s meaning must be the “impression and signification” the term “convey[s] to the public.” *Id.* The example cited by the court in *Dixie Rose* was “cellophane” because “cellophane” only conveys one meaning to the public. *Id.* The “impression and signification” the word “convey[s] to the public” is not a particular sort of grass seed. When the word is used in relation to grass seed, it is often an identifier of a source of grass seed, i.e. REBEL brand grass seed. *Id.* In support of his position, the Examining Attorney cited various articles discovered during a computerized search. The results of the search, however, show REBEL in various irrelevant references, including REBEL as a name for products other than grass seed (e.g. wheat, French beans, and radishes) or uses outside of the United States. Other instances (the Lofts Seed examples) are trademark usage by application, its licensee, or predecessor in interest.

The evidence cited in the Office Action shows usage of REBEL as a trademark. In numerous places, the articles refer to 'Rebel' tall fescue (*festuca arundinacea*.) The public is likely to perceive this to be a presentation of the usage format of "trademark: generic name," the classic way trademarks are to be used. Thus, the impression and signification the word conveys to the public is of a trademark.

In particular, there is no evidence that the purchasing public regards REBEL, as associated with grass seed, to be other than a trademark.

B. As long as REBEL indicates source, it is a trademark and is not generic.

REBEL grass seed is a unique product, but to say that applicant is its only source, whether by virtue of PVP protection or otherwise, does not mean the REBEL is not a source indicator. The mark can have two meanings, one of which is a trademark, as long as, in fact, it indicates the source of the goods to customers. Congress made this point in 1984 in amending Sections 14 and 45 of the Lanham Act by stipulating that the mark could also be the name of or to identify a unique product. In so doing, it was over-ruling a finding that MONOPOLY for board games is generic simply because it only has one source. As the Senate Judiciary Committee reported:

"The basic fallacies of the *Anti-Monopoly* holding are several. First, the Ninth Circuit failed to recognize that a trademark does not automatically become a generic designation simply because the product on which it is used is a unique product. It also ignored the accepted concept that a trademark can serve a dual function – that of identifying a product while at the same time indicating its source. Admittedly, if a product is unique, it is more likely that the trademark adopted and used to identify that product will be used as if it were the identifying name of that product. But this is not conclusive of whether the mark is generic. The salient question is the primary significance of the term to the consumer. If the term indicates a product of a single

producer to the consumer, it is a valid trademark." S. Report 98-627, 98th Congress 2nd Session, "The Trademark Clarification Act of 1984," pg. 5.

C. REBEL is Distinctive, Inherently or by Secondary Meaning.

REBEL is inherently distinctive, having no descriptive qualities as to seeds whatever. Also, applicant has used REBEL extensively and has licensed others to do so, so that their use inures to the benefit of applicant. In addition, \$400,000,000 of REBEL seed has been sold since 1979, and \$25,000,000 has been spent marketing REBEL seed during the same period. As a result, even if REBEL were to be said to be descriptive, it has acquired secondary meaning.

D. The public has alternate names to call the seed.

One of the considerations in functionality/genericness analyses is whether competitors have alternatives to the feature to which exclusive rights are sought.

The Examining Attorney's documentation indicates that REBEL grass seed is also known as "festuca arundinacea schreber," and Bartes is a synonym. Those who wish to sell these seeds have alternate appellations they can apply to the seed, and are not required to call the seed "REBEL" in order to tell the public what they are selling. Giving exclusive rights to the word "REBEL" to Applicant does not prevent others from selling the seed, nor from identifying its species. By according trademark rights to Applicant, Applicant instead would be justly rewarded for the long time, effort and investment it made in promoting the trademark "REBEL." Competitors can still sell festuca arundinacea schreber or Bartes seeds and thereby tell their customers what the product is, without misappropriating Applicant's goodwill in the "REBEL" mark. And, consumers who see "REBEL" associated with grass

seed can continue to expect the level of quality they have come to associate with "REBEL" seeds. If others want to sell "festuca arundinacea schreber" or Bartes seeds, permitting registration of "REBEL" will not interfere with that legitimate activity.

III. Substantial evidence shows that the mark REBEL is a trademark and not generic, and hence should be registerable.

In order to require disclaimer, the examining attorney must find substantial evidence that REBEL is generic. *In re Montrachet S.A.*, 11 USPQ 2d 1393 (Fed. Cir. 1989), *Recot Inc. v. M.C. Becton*, 54 USPQ 2d 1894 (Fed. Cir. 2000). Functionality (and therefore genericness) is a question of fact. *Valu Engineering Inc. v. Rexnord Corp.*, 61 USPQ 2d 1422 (Fed. Cir. 2002). Even if a *prima facie* case is deemed to have been established, the burden merely shifts to Applicant to overcome that *prima facie* case. *Textron v. United States International Trade Commission*, 220 USPQ 625, 629, 753 F.2d 1025, 1029 (Fed. Cir. 1985).

What are the facts here? Applicant adopted the mark REBEL as a trademark for grass seed. REBEL is, without question, an arbitrary designation for grass seed, having no descriptive characteristics whatever. Applicant obtained plant variety protection for its grass seed and identified the grass seed by the trademark and varietal name, REBEL, and has been selling REBEL grass seed for over 20 years.

In addition to the fact that REBEL is arbitrary, there is also significant secondary meaning accruing to Applicant. Applicant has used the mark extensively and has licensed others to do so, so that their use inures to the benefit of Applicant. Applicant's use began by a predecessor in interest on August 21, 1980, so well over 20 years of use has passed, far exceeding the five year period required under for a presumption of secondary meaning under Section 2(f). Use in the form sought to be registered has also continued more than five years, beginning August 1, 1998.

In order to conclude that the mark is generic and must be disclaimed, the examining attorney must (1) disregard the fact that the mark was born arbitrary; (2) disregard the fact that secondary meaning has accrued to Applicant; and (3) limit his

analysis solely to the fact that the mark has been used as a varietal name in a PVP. Indeed, the Examining Attorney even cited the now-obsolete aphorism that it is against public policy for a patent owner to have trademark rights in the varietal name for the protected plant. As has been pointed out above, in doing so the examining attorney has applied an archaic rule that has been left behind by Congress, the courts and by commentators like Professor McCarthy for most forms of intellectual property.

IV. The Examining Attorney's Rule Does Not Protect The Public Interest.

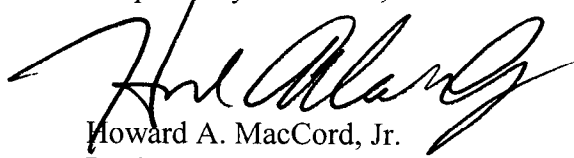
The current rule disregards the public interest protected by source identification. As noted above, the *Honeywell* court observed that Federal trademark laws seek to prevent the public from encountering confusion, mistake, and deception in the purchase of goods and services and to protect the integrity of the trademark owner's product identity. To protect the public from confusion, mistake, and deception in the purchasing of plant goods, trademark rights for plant varieties must also prevail over concerns of any hypothetical extension of exclusivity. Correcting the rule by, at the least, restoring the proper elements from *Dixie Rose* would provide such protection.

Even though the REBEL trademark does not satisfy the *Dixie Rose* criteria for genericness is arbitrary, and hence inherently distinctive, and has acquired secondary meaning, the Examining Attorney has still refused registration without disclaimer by the application of the no-varietal-names-as-trademarks rule. This does not serve the public interest.

CONCLUSION

In order to conclude that REBEL must be disclaimed and that the mark sought to be registered is merely descriptive, the examining attorney had to limit his analysis solely to the fact that REBEL has been used as a varietal name for a product protected by a PVP. As has been pointed out above, in doing, so the examining attorney would be applying an archaic rule that has been left behind by Congress, the courts and commentators for most forms of intellectual property.

Respectfully submitted,



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